No.....

In The

United States Circuit Court of Appeals

For The Sixth Circuit

Giles Kavanagh,
Collector of Internal Revenue,
Defendant and Appellant.

v.

J. H. Noble,
Plaintiff and Appellee,

Appeal From the District Court of the United States for the Eastern District of Michigan, Southern Division.

TRANSCRIPT OF RECORD

John C. Lehr,
United States Attorney.

Morris Zwerdling,
Assistant United States Attorney,
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Detroit, Michigan,
Counsel for Appellant.

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201 Harris Building,
Fort Valley, Georgia.

Julius L. Berns,
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Detroit, Michigan,
Counsel for Appellee.

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UNITED STATES OF AMERICA

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

J. H. NOBLE,
Plaintiff,
vs.
GILES KAVANAGH, Collector of Internal Revenue,
Defendant.

Civil No. 5855

STATEMENT OF POINTS TO BE RELIED UPON

(Filed Aug. 13, 1946)

Giles Kavanagh, defendant and appellant herein, hereby states points upon which he intends to rely in this Court in this case as follows:

1. The Court erred in overruling defendant's motion for summary judgment and in granting plaintiff's motion for summary judgment.

2. The Court erred in finding and concluding that plaintiff's claim for refund of the disputed portion of the deficiency assessment paid to defendant on July 21, 1937, on account of plaintiff's 1935 income tax was timely filed on January 28, 1941, under the four year period of limitation running from the date of payment thereof which is prescribed by Section 3313 of the Internal Revenue Code (26 U.S.C. 1940 ed., Sec. 3313).

3. The Court erred in refusing to find and conclude that plaintiff's said claim for refund was not timely filed under the two year period of limitation running from the payment thereof which is prescribed by Section 322(b)(1) of the Internal Revenue Code (26 U.S.C. 1940 ed., Sec. 322).

4. The Court erred in rendering judgment against defendant and in favor of plaintiff in any amount.

JOHN LEHR,
United States Attorney,

By MORRIS ZWERDLING,
Assistant United States Attorney,
Attorneys for Defendant.

Dated: August 12, 1946.

PLAINTIFF'S THIRD AMENDED COMPLAINT

(Filed February 6, 1945)

Now comes J. H. Noble, plaintiff herein and with the leave of the Court first had and obtained files this his Third amended complaint so that for the convenience of Court and counsel his cause of action as developed in prior pleadings may be incorporated in one pleading, and alleges:

1.

Plaintiff is a citizen of the United States residing in the County of Palm Beach, State of Florida, but was a resident of Wayne County, Michigan during 1935, 1936 and 1937.

2.

Defendant is a resident of Wayne County, Michigan and is and was at all times hereinafter named, Collector of Internal Revenue for the District of Michigan and was the Collector to whom the monies now sought to be recovered were paid.

3.

This is a suit arising under the laws of the United States providing for internal revenue and is a suit for the recovery of $21,105.90 erroneously and illegally collected from plaintiff as for internal revenue taxes.

4.

In March, 1936, the plaintiff, J. H. Noble, and his wife, Ethel G. Noble, filed with the defendant Collector of Internal Revenue at Detroit, Michigan, their joint individual income tax return on Treasury Form 1040 for the calendar year 1935, reporting total tax due of $8,017.01 which was duly paid by the plaintiff to said Collector in quarterly installments during the year 1936.

5.

On said return the losses and gains from sales of capital assets were reported together, the losses of the wife being deducted from the gains of the husband, resulting in a net loss in excess of $2,000.00, which amount (the allowable limit of loss) was deducted on the return.

6.

Thereafter, the said J. H. Noble and Ethel G. Noble were notified by the Internal Revenue Agent in Detroit, Michigan, of a proposed tax deficiency against them, pursuant to which notice a conference was held on June 7, 1937, in the office of the Internal Revenue Agent in Charge in Detroit, Michigan.

7.

At said conference on June 7, 1937, plaintiff agreed upon a proposed deficiency in income tax for the year 1935 with interest thereon aggregating $421.80 for which amount plaintiff gave his individual check on that date payable to the Collector of Internal Revenue and waiver agreement Form 870 that such amount was the deficiency was executed by plaintiff and his wife.

8.

Said Waiver Form 870 is not a "closing agreement", nor does it preclude the assertion of a further deficiency or the assertion of a claim for refund.

9.

Thereafter, under date of June 11, 1937, the Internal Revenue Agent in Charge at Detroit wrote the plaintiff stating that the proposed deficiency instead of being $421.80, as advised at the conference on June 7, 1937, should be $19,973.93 (besides interest) giving as his reason that under Regulation 86, Article 117-5, in a joint

return the losses from sales of capital assets of one spouse could not be set off against the gains of the other spouse from such sales. A true copy of that letter is attached hereto as Exhibit "A".

10.

Thereupon, after further conference and protest, on July 14, 1937 plaintiff's prior check for $421.80 was returned to him and he gave his individual check for $21,527.70 payable to the defendant Collector. Said latter check of $21,527.70 included the deficiency and interest thereon amounting to $421.80 determined and paid at the June 7, 1937 conference and also included the $21,105.90 collected and assessed by reason of the ruling of the Commissioner that in the sales of capital assets the losses of the plaintiff's wife could not be set off against his gains.

11.

On December 9, 1940 the United States Supreme Court in the case of *Helvering v. Janney, et al.* (311 U.S. 189) held that in a joint return the losses of one spouse from sales of capital assets should be set off against the gains of the other spouse from like sales, thus holding in effect that the assessment and collection of said $21,106.90 from plaintiff had been erroneously and illegally made.

12.

On January 28, 1941 plaintiff and his wife filed in the office of the defendant Collector on Treasury Department Form 343 a claim for refund of the erroneous and illegal collection aforesaid with interest from July 14, 1937.

13.

It was stated in said claim for refund that the time within which the same might be legally filed under Section 619(C) of the Revenue Act of 1928 would expire on July 14, 1941, and the ground of the claim stated therein was:

"The Internal Revenue department refused to allow the losses of one spouse against the gains of the other spouse in the joint return of husband and wife, and made an extra assessment on July 11, 1937 in the principal sum of $19,973.93 and interest in the sum of $1,553.77 which amounts were paid under protest on July 14, 1937. We claim this to be an illegal assessment and collection, and that it should be refunded to the claimants.

United States Code Annotated, Title 26, Section 3313."

14.

On July 12, 1941, plaintiff individually filed with the defendant Collector on Form 843 a claim for refund of the amount illegally and errnoeusly assessed and collected from him and upon the same ground.

15.

On August 19, 1941, the Commissioner of Internal Revenue notified the plaintiff by registered mail of the disallowance and rejection of the claim of January 28, 1941, solely on the ground that the said claim had not been filed within the period of limitation prescribed by law.

16.

The claims for refund were filed within four years after the payment of the tax, and this action was begun within two years after the disallowance of the claim, having been begun on July 10, 1943.

17.

The action of the Commissioner in disallowing the said claim was erroneous and illegal in that the Commissioner applied, in determining the period of limitatin allowed for the filing of a claim for taxes erroneously and illegally assessed and collected, Section 322(b) of the Revenue Act of 1934, whereas the provision of law properly applicable

was and is Section 3228(a) Revised Statutes as amended by Section 1316 Act of November 23, 1921, Section 1012 of Revenue Act of 1924, Section 1112 Revenue Act of 1926, Section 619(e) Revenue Act of 1928 and Section 1106(a) Revenue Act of 1932; said section as so amended being Internal Revenue Code Section 3313.

Wherefore, Plaintiff prays for judgment against the defendant in the sum of $21,105.90 with interest thereon from July 14, 1937, as provided by law.

E. M. Baynas,
W. H. Harris,
Julius L. Berns,
Plaintiff's Attorneys.

VERIFICATION

State of Florida,
County of Palm Beach.

Personally appeared J. H. Noble, who being duly sworn, herein on oath, says that he is the plaintiff named in the foregoing proceeding and that the allegations and statements therein are true to the best of his knowledge and belief.

J. H. Noble.

Subscribed and sworn to before me
this 2nd day of January, 1945.

Minnie Keasley,
Notary Public, State of Florida at Large.
My commission expires December 18, 1948.
(Seal)

EXHIBIT "A"

TREASURY DEPARTMENT
Internal Revenue Service
Detroit, Michigan
June 11, 1937

555 Federal Building
IT:S—6/24/37

Mr. J. H. Noble
18055 Hamilton Road
Detroit, Michigan

Sir:

In conference on June 7, 1937, you were advised that an additional tax of $421.80 was due on your 1935 income tax return.

In completing the audit of the return, it was found that you had failed to comply with the provisions of Article 117-5, Regulations 86, Article 117-5, reads as follows:

> "In the application of Section 117, a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers. Accordingly, the limitation under Section 117(d) on the allowance of losses of one spouse from sale or exchange of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets."

When this provision is applied to the sales of stocks, Mrs. Noble has a net loss of $49,862.56, of which $2,000.00 is deductible, and you have a net gain of $45,049.45.

After allowing you an earned income credit of $853.59 and Mrs. Noble $300.00 an additional tax of $19,273.93 results.

The check and agreement submitted for 1935 are being held in this office, subject to instructions from you. Should

you desire to protest the adjustment, please so advise this office, and the check and signed agreement will be mailed to you. Should you desire to accept the new computation, the agreement will be mailed to you. Should you desire to accept the new computation, the agreement previously signed will be sent forward with the report, the check submitted will be deposited with the Collector of Internal Revenue, and payment of the balance due may be made when assessed.

Please advise what action you contemplate at the earliest date possible. In your reply, please refer to the symbols IT:S—6/24/37.

GEORGE E. NEAL,
Internal Revenue Agent in Charge.
By W. A. FINNEY.

ANSWER TO THIRD AMENDED COMPLAINT

(Filed February 21, 1945)

The defendant, Giles Kavanagh, Collector of Internal Revenue for the Collection District of Michigan, comes now by his attorney, John C. Lehr, United States Attorney for the Eastern District of Michigan, and for his answer to the third amended complaint, avers as follows:

FIRST DEFENSE

The third amended complaint fails to state facts showing a claim upon which relief can be granted as against the defendant Collector.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of this litigation because plaintiff has not met the conditions precedent upon which the United States has consented that suits may be maintained against its collectors of Internal Revenue of this character, since plaintiff failed to file claim for refund of the disputed exaction of income tax within the time required by law.

THIRD DEFENSE

For further answer to the third amended complaint defendant avers as follows:

I

Admits the averments contained in paragraphs 1, 2, 5, 6, 8, 9 and 15 of the third amended complaint.

II

Denies the averments contained in paragraph 3 of the amended complaint except admits that this is a suit arising under the laws of the United States providing for

internal revenue and is an action for the recovery of $21,105.90 alleged to have been erroneously and illegally overpaid by plaintiff as internal revenue taxes.

III

Admits the averments contained in paragraph 4 of the third amended complaint with the additional averment that plaintiff and his wife filed their joint individual tax return for the calendar year 1935 on March 16, 1936, and the last quarterly payment in the sum of $2,004.25 of the tax therein reported to be due was made by plaintiff on December 19, 1936.

IV

Admits the averments contained in paragraph 7 of the third amended complaint but avers that said check for $421.80 and Waiver Agreement Form 870 referred to in said paragraph were never delivered to or received by this defendant.

V

Admits, upon the basis of information and belief, the averments contained in paragraph 10 of the third amended complaint except this defendant avers that on July 21, 1937, he received from the Office of Internal Revenue Agent in Charge at Detroit, plaintiff's check made payable to the order of this defendant for the sum of $21,527.70 and a written "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax" in the principal sum of $19,973.93 for the year 1935, signed by the plaintiff J. H. Noble, and his wife Ethel G. Noble, together with a report from the Internal Revenue Agent in Charge addressed to the Commissioner of Internal Revenue at Washington, D. C., showing the basis of said deficiency assessment and that plaintiff had waived his right to petition the United States Board of Tax Appeals (now the United States Tax Court) for redetermination of said deficiency and had consented to its immediate assessment

and collection without prejudice to plaintiff's right to file claim for refund after payment thereof.

A true copy of the above-mentioned "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax" for the year 1935 is attached hereto, marked Exhibit A and incorporated by reference as a part of this answer.

VI

Denies the averments contained in paragraph 11 of the third amended complaint except admits that the Supreme Court of the United States rendered its decision in the case of *Helvering* v. *Janney* (311 U.S. 189) on December 9, 1940, and avers that the Supreme Court's decision speaks for itself.

VII

Denies the averments contained in paragraph 12 of the third amended complaint except admits that on January 28, 1941, plaintiff and his wife filed claim for refund of 1935 income tax paid in the sum of $21,105.90, plus interest after its payment.

VIII

Denies averments contained in paragraph 13 of the third amended complaint except admits that the statement of grounds for recovery asserted in the claim for refund of $21,105.90 filed by plaintiff and his wife on January 28, 1941, as set forth in said claim for refund is correctly quoted and copied in said paragraph 13 of the amended complaint.

IX

Admits the averments in paragraph 14 of the third amended complaint that plaintiff individually filed with defendant a claim for refund of 1935 income tax paid in the sum of $21,527.70, but denies all other averments in said paragraph.

X

Admits the filing of plaintiff's claim for refund within four years after payment of disputed tax and the commencement of this action within two years after the disallowance of the claim, as averred in paragraph 16 of the third amended complaint, but denies that said claim for refund was timely filed.

XI

Denies the averments contained in paragraph 17 of the third amended complaint and avers in this connection that plaintiff was required by the provisions of Section 322(a) and (b)(1) and Sections 3770(a)(1) and 3772 (a)(1) of the Internal Revenue Code (26 U.S.C. 1940 ed., Sections 322, 3770, and 3772), to file his claim for the disputed collection for his 1935 income tax within three years after the date of the filing of plaintiff's 1935 income tax return (March 16, 1936) or within two years after the date on which the defendant's Collector received payment of the disputed deficiency assessment of plaintiff's 1935 income tax (July 21, 1937), whichever period is later; and that when plaintiff failed to file its claim for refund of said disputed deficiency until January 28, 1941, and after the expiration of both of the alternative limitation periods therefor as above provided, the Commissioner of Internal Revenue was without jurisdiction or authority to allow a refund to plaintiff in any amount with respect to income tax paid for said year 1935.

XII

Denies each and every averment in the third amended complaint not herein before specifically admitted, denied or explained, and denies that he is indebted to plaintiff or that plaintiff is entitled to recover any sum from this defendant in this action.

And now having fully answered this defendant demands judgment dismissing the third amended complaint and for his costs and lawful disbursements herein.

JOHN C. LEHR,
United States Attorney.

C. T. DINU,
Assistant U. S. Attorney.

EXHIBIT A

Form 870

TREASURY DEPARTMENT
Internal Revenue Service
Revised Oct., 1935.

Received
Jun 2 1937

Waiver of Restrictions on Assessment and Collection of Deficiency in Tax

Pursuant to the provisions of Section 272(d) of the Revenue Act of 1934, and/or the corresponding provisions of prior Revenue Acts, the restrictions provided in Section 272(a) of the Revenue Act of 1934, and/or the corresponding provisions of prior Revenue Acts, as amended, are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in income tax and/or excess-profits tax:

taxable year ended 1935 income tax in the sum of $19,973.93

taxable year ended ..... income tax in the sum of $.....

taxable year ended ..... income tax in the sum of $.....

taxable year ended .....
excess-profits tax in the sum of $.....

taxable year ended .....
excess-profits tax in the sum of $.....

amounting to the total sum of.....$.....
together with interest thereon as provided by law.

(Sgd.) J: H. Noble,
Taxpayer,

(Sgd.) Ethel G. Noble,
Taxpayer,
18055 Hamilton Rd.
Address.
By Detroit, Mich.

Date.....

NOTE.—The execution and filing of this waiver at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under Section 606 of the Revenue Act of 1928 and does not, therefore, preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

If this waiver is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other.

Where the taxpayer is a corporation, the waiver shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

AGREED STATEMENT OF FACTS

(Filed May 23, 1945)

It is hereby stipulated and agreed by and between the parties by their respective attorneys of record that upon any hearing of this cause and solely for the purpose of such hearing the following facts shall be taken to be true. This stipulation is without prejudice to the right of either party to offer evidence at the hearing to establish other facts not inconsistent with those herein stipulated.

1.

Plaintiff is a citizen of the United States and during 1935, 1936 and 1937 was a resident of Wayne County, Michigan.

2.

Defendant is a resident of Wayne County, Michigan, and is and was at all times hereinafter named Collector of Internal Revenue for the District of Michigan and is the Collector to whom plaintiff paid the money now sought to be recovered.

3.

This is a suit for the recovery of the principal sum of $21,105.90 alleged to have been erroneously and illegally collected from the plaintiff as for internal revenue taxes.

4.

On March 16, 1936, the plaintiff filed with the defendant Collector of Internal Revenue at Detroit, Michigan, the joint individual income tax return of himself and wife on Treasury Form 1040 for the calendar year 1935, reporting total tax due of $8,017.01 which was paid by the plaintiff to said Collector quarterly, the last quarterly payment having been made on December 19, 1936.

5.

On said return the losses and gains from sales of capital assets by plaintiff and by his wife were reported together, the losses of the wife being deducted from the gains of the husband, resulting in a net loss in excess of $2,000.00, which amount (the allowable limit of loss) was deducted on the return.

6.

Plaintiff was called into a conference in the office of the Internal Revenue Agent in Charge at Detroit on June 7, 1937, at which time there was determined an additional income tax for the year 1935 with interest thereon aggregating $421.80 for which amount plaintiff gave to the Internal Revenue Agent in Charge his check on that date, payable to the Collector of Internal Revenue. That check unused was later returned to plaintiff without having been delivered to the defendant Collector.

7.

On said date, June 7, 1937, plaintiff and his wife executed a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax" on Treasury Form 870. That consent for the immediate assessment of a deficiency of $421.80 was never used by the Bureau of Internal Revenue for reasons hereinafter set forth.

8.

(a) By letter dated June 11, 1937, George E. Neal, Internal Revenue Agent in Charge at Detroit, notified plaintiff as follows:

> "In conference on June 7, 1937, you were advised that an additional tax of $421.80 was due on your 1935 income tax return.
>
> In completing the audit of the return, it was found that you had failed to comply with the pro-

visions of Article 117-5, Regulations 86. Article 117-5 reads as follows:

> 'In the application of Section 117, a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers. Accordingly, the limitation under Section 117 (d) on the allowance of losses of one spouse from sales or exchanges of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets.'

When this provision is applied to the sales of stocks, Mrs. Noble has a net loss of $49,862.56, of which $2,000.00 is deductible, and you have a net gain of $45,049.45.

After allowing you an earned income credit of $853.59 and Mrs. Noble $300.00, an additional tax of $19,973.93 results.

The check and agreement submitted for 1935 are being held in this office, subject to instructions from you. Should you desire to protest the adjustment, please so advise this office, and the check and signed agreement will be mailed to you. Should you desire to accept the new computations, * * * the check submitted will be deposited with the Collector of Internal Revenue, and payment of the balance due may be made when assessed:

Please advise what action you contemplate at the earliest date possible. * * *''

(b) A detailed statement of recomputation which was prepared in the office of the Internal Revenue Agent in Charge more fully covering the proposed deficiency is as follows:

J. H. and Ethel G. Noble

SUMMARY

Year, 1935; Increase in Income, $46,455.46; Additional Tax, $19,973.93.

STATEMENT OF TOTAL TAX LIABILITY

Tax Previously Assessed	Deficiency	Correct Tax Liability
$8,017.01	$19,973.93	$27,990.94

SCHEDULE 1

BLOCK ADJUSTMENTS

	Return	*Additions to Income*	*Corrected*
2. Business	($1,542.98)	$ 1,069.00	($ 473.98)
3. Interest	875.26		875.26
8. Capital Gain	(2,000.00)	45,409.45	43,049.45
10. Dividends	65,361.14	126.08	65,487.22
12 Total Income	$62,693.42		$108,937.95
14. Taxes	2,873.66	210.93	2,662.73
16. Bad Debts	5,000.00		5,000.00
17. Contributions	100.00		100.00
18. Other Deductions	763.05		763.05
19. Total Deductions	$8,736.71		$8,525.78
TOTAL INCOME	$53,956.71	$46,455.46	$100,412.17

SCHEDULE 1-A

EXPLANATIONS

Item 2. Mr. Noble's business is trading in stocks and bonds. A deduction of $1,542.98 expense consisting of the following items was claimed.

(a) Bloomfield Hills Club dues	$ 180.00
(b) Automobile depreciation	760.00
Miscellaneous	42.00
(c) Depreciation on office furniture	129.00
Telephone	45.70
(d) Traveling expense	386.28
Total	$1,542.98

(a) Club dues have been disallowed as a personal expense. I. T. 1844, C. B. II—2, page 104 reads in part as follows:

"A taxpayer was employed in a business where the greater part of his income was dependent upon the amount of business secured and he, therefore, joined a certain athletic club for the purpose of meeting its members in order to obtain business from them. The dues are not deductible."

(b) Depreciation of $760.00 on a Cadillac V-16 was deducted. Since it has not been shown that a car was necessary to the operation of a stock trading account the depreciation claimed has been disallowed.

(c) Depreciation of $129.00 on furniture, rugs, etc. was claimed. This amount is at 3% on a cost of $4,300 and is on furniture in home, on the theory that his home was used for an office. This amount has been eliminated as no regular office is maintained in home.

(d) Mr. Noble makes various trips to New York to investigate, and secure first hand information on stock in which he is trading. Traveling expense has been accepted as reported.

Item 8. For computation of loss on stock transactions see Schedule attached as Exhibit A.

Item 10. Dividends reported consist of the following Items:

Paine Webber & Co.	
John H. Noble (joint acct.)	$13,175.00
John H. Noble #2%	11,250.00
Ethel G. Noble	2,160.00
Ethel G. Nobel (direct)	24,275.00
General Motors	380.00
Sterling Products	600.00
S. O. of Indiana	135.00
Whitehouse & Co.	
Kennicott	100.00
John H. Noble (direct)	
General Motors 5% pfd	320.00
General Motors Com	11,808.75
S. O. of Indiana	600.00
Dupont	224.35
Kennecott	135.00
Total	$65,163.10

Both Mr. and Mrs. Nobel received $325.00 dividends from Kennecott Copper Company and each reported $135.00 as taxable. This amount has been accepted subject to approval by the Bureau.

A dividend of 2-13/55 shares of General Motors preferred stock was received as a dividend on Dupont stock. Market value, $126.08.

Item 4. Taxes deducted have been verified and found correctly reported with the exception of $210.93. Special assessment taxes which have been eliminated.

Item 16. In 1935 Mr. Noble entered into a composition agreement whereby he accepted $22.25 for a loan of $5,000 to Harry S. Covington. Mr. Noble states he does not remember the exact date of the loan, but it was some time before the bank crash. For full details see statements attached as Exhibits B and C.

Mr. Noble deducted the full $5,000 in 1935 and reported the receipt of $22.25 in 1936. Adjustment is not warranted.

Item 18. An assessment of $763.05 was paid on Detroit Guardian Group bank stock 3/26/35. The stock became worthless in 1933.

SCHEDULE 2

Computation of Earned Income Credit

	Husband	*Wife*
Earned Income:		
Income from business (not in excess of 20 percent of $45,049.45)	$9,009.89	
Earned Income Deductions:		
Expense (Item 1)	473.98	
Earned Net Income	8,535.91	
Entire Net Income	68,174.67	$32,237.50
Earned Income Credit:		
(10 percent of $8,535.91)	853.59	
(10 percent of $3,000.00)		300.00
Total Earned Income Credit (husband and wife)		$1,153.59

SCHEDULE 3

Year ended 12/31/35

COMPUTATION OF TAX

Net income (from Schedule 1)		$100,412.17
Less: Personal exemption	$2,500.00	
Credit for dependents	400.00	2,900.00
Income subject to surtax		$97,512.17
Less: Dividends	$65,487.22	
Earned income credit	1,153.59	66,640.81
Balance subject to normal tax		$30,871.36
Normal tax at 4% on $30,871.36	$1,234.85	
Surtax on $97,512.17	26,756.09	
Total tax assessable		27,990.94
Tax previously assessed		8,017.01
Tax to be assessed		$19,973.93

9.

After protest and further conference, and on July 14, 1937, plaintiff's check for $421.80 (which had never been delivered to the defendant Collector) was returned to plaintiff; plaintiff gave the Internal Revenue Agent in Charge a new check for $21,527.70 payable to the defendant Collector covering the then proposed deficiency assessment of tax of $19,973.93 plus deficiency interest computed thereon of $1,553.77; and the check for $21,527.70 was received on July 21, 1937, by the defendant Collector, who remitted same to the Treasury of the United States as a collection of internal revenue.

10.

On June 14, 1937 plaintiff and his wife executed and delivered to the Internal Revenue Agent in Charge at

Detroit another Waiver Agreement Form 870 under which they waived certain statutory restrictions in their favor and consented to the immediate assessment and collection of a deficiency against them of 1935 income tax in the principal sum of $19,973.93, and the Commissioner of Internal Revenue thereafter duly assessed a deficiency against them of tax of $19,973.93 plus deficiency interest thereon of $1,553.77, totaling the sum of $21,527.70 above mentioned.

11.

The said waiver agreement Form 870 contains a footnote printed on same reading in part as follows:

> "The execution and filing of this waiver at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under Section 606 of the Revenue Act of 1928 and does not, therefore, preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.
>
> "If this waiver is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, . . ."

12.

On January 28, 1941, plaintiff and his wife filed in the office of the defendant Collector on Treasury Form 843 a claim for refund of income tax together with deficiency interest paid thereon for the year 1935 in the total sum of $21,105.90, plus interest after its payment. That claim for refund was on the ground stated therein as follows:

> The Internal Revenue Department refused to allow the losses of one spouse against the gains of the other spouse in the joint return of husband

and wife, and made an extra assessment on July 11, 1937 in the principal sum of $19,973.93 and interest in the sum of $1,553.77 which amounts were paid under protest on July 14, 1937. We claim this to be an illegal assessment and collection, and that it should be refunded to the claimants. United States Code Annotated, Title 26, Section 3313.

On August 19, 1941, the Commissioner of Internal Revenue formally notified plaintiff and his wife by registered mail of the disallowance and rejection of said claim for refund. In that letter the Commissioner referred to an earlier communication which had been sent by the Bureau of Internal Revenue to plaintiff and his wife on April 25, 1941, in which the grounds for his decision had been stated by a subordinate of the Commissioner as follows:

> Claim filed January 28, 1941 for the refund of $19,973.93 additional tax and $1,553.77 interest paid July 21, 1937 on 1935 income tax return is rejected in accordance with Sec. 322(b)(1) of the Revenue Act of 1934, which reads in part as follows:
>
> "Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later."
>
> Section 3313 of the Internal Revenue Code, referred to in the claim specifically excludes income taxes from the taxes for which a claim may be filed within four years after payment.

14.

Meanwhile on July 12, 1941 plaintiff transmitted and delivered to the defendant Collector his individual claim for refund of $21,527.70 covering the above mentioned

payment of 1935 income tax and interest paid thereon on July 16, 1937. That claim was executed and verified under oath by the plaintiff individually on July 3, 1941, and was on the same grounds as the claim filed by the plaintiff and his wife on January 28, 1941 and set forth in paragraph 12 hereof.

15.

Said individual claim executed July 3, 1941 was returned by letter dated August 7, 1941 from the defendant Collector to the plaintiff with a request that the plaintiff's wife join in the execution of the claim, which request was refused, and the claim was returned to the defendant Collector on September 23, 1941; and on October 3, 1941 the defendant again returned the claim to the plaintiff.

16.

Plaintiff's said claim dated July 3, 1941, and delivered to the defendant Collector on July 12, 1941 for transmission to the Commissioner of Internal Revenue has not been acted on by the Commissioner.

17.

The parties stipulate expressly without prejudice to their respective rights herein that for the purpose of a breakdown of the deficiency collection of 1935 income tax and deficiency interest totalling $21,527.70 hereinbefore mentioned, (a) $21,105.90 thereof may be allocated to the Commissioner's adjustment increasing the reported income under the joint return by $45,049.45 under his ruling that losses sustained by plaintiff's wife from the sale of her capital assets could not be offset against gains derived by the plaintiff from the sale of his capital assets during the taxable year; and (b) that the balance of said payment consisting of tax deficiency and interest thereon paid to the extent of $421.80 may be allocated to certain other adjustments made by the Commissioner to the returned income for the year 1935, the propriety of which is not in question in this proceeding.

18.

Plaintiff commenced this action on July 10, 1943.

Executed this 19th day of May, 1945.

E. M. BAYNES,
W. M. HARRIS,
JULIUS BERNS,
Attorneys for Plaintiff.

JOHN C. LEHR,
United States Attorney,

MORRIS ZWERDLING,
Assistant United States Attorney,

FRANK J. READY,
Special Ass't to the Attorney General,
Attorneys for the Defendant.

DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AGAINST PLAINTIFF

(Filed January 15, 1946)

Comes the defendant by his attorneys, John C. Lehr, United States Attorney for the Eastern District of Michigan, and Morris Zwerdling, Assistant United States Attorney for said district, and moves the Court to dismiss this action for lack of jurisdiction to grant plaintiff any relief under the third amended complaint and by reason of plaintiff's claim being barred by the statute of limitations, for the following reasons:

(1) Because plaintiff failed to file claim for refund of the disputed portion of the deficiency payment of his 1935 income tax now in controversy either before the expiration of three years after the time of the filing of plaintiff's 1935 income tax return (March 16, 1936) or before the expiration of two years after the time the disputed

tax was paid (July 21, 1937), whichever was later, as prescribed by Sections 322(a)(1) and (b)(1), 3770(a)(1) and 3772(a)(1) of the Internal Revenue Code (26 U.S.C. 1940 ed., Sections 322, 3770 and 3772);

(2) Because the four-year period of limitation prescribed by Section 3313, Internal Revenue Code (26 U.S.C. 1940 ed., Section 3313) for the filing of claims for refund of certain internal revenue tax payments does not apply to the disputed portion of the deficiency payment on account of plaintiff's 1935 income tax which is sought to be recovered herein; and

(3) Because there are no material facts under the pleadings and agreed statement herein which are now in dispute between the parties.

Memorandum of authorities in support of this motion and in opposition to plaintiff's motion for judgment will be served and filed at least ten days prior to the hearing upon the conflicting motions.

JOHN C. LEHR,
United States Attorney,

By MORRIS ZWERDLING,
Assistant United States Attorney.

Dated: January 15, 1946.

AMENDED MOTION FOR SUMMARY JUDGMENT

(Filed February 24, 1946)

Now comes the Plaintiff and Amends his Motion for Summary Judgment upon the Pleadings heretofore filed and herein sets forth the grounds and reasons therefor:

1.

The sum of $21,105.90 paid by the Plaintiff to the Defendant on July 14, 1937, was assessed by the Commis-

sioner and collected by the Defendant under the ruling of the Commissioner that on the joint return for 1935 filed by Plaintiff and his wife, the losses of his wife from sales of capital assets could not be offset against Plaintiff's gains from such sales.

2.

On December 9, 1940, the United States Spreme Court in *Helvering v. Janney, et al.*, 311 U.S. 189, held that such ruling of the Commissioner was erroneous and illegal so that the said payment was erroneously and illegelly assessed and collected.

3.

The original claim for refund was filed January 29, 1941, and a subsequent claim for refund was filed July 12, 1941, so that claim was filed more than two years after the illegal and erroneous assessment was made, but within less than four years after such payment.

4.

The only point at issue is whether the limitation period for the filing of a claim for refund provided in Internal Revenue Code Section 3313 or that provided in Internal Revenue Code Section 322 controls in this case.

5.

In *United States v. The Lederer Terminal Warehouse Company*, 139 F(2d) 679, the Circuit Court of Appeals of this Circuit held in a like case that Section 3313 controls and that a claim filed within four years after the payment of the tax was timely.

6.

Because there are no material facts under the Pleadings and the Agreed Statement of Facts herein, which are now in dispute between the parties.

Wherefore, Plaintiff prays Summary Judgment against the Defendant for the sum of $21,105.90, with interest thereon from July 14, 1937, as privoded by law.

Dated: February 19, 1946.

E. M. Baynes,
W. H. Harris,
Julius L. Berns,

By: Julius L. Berns,
Attorneys for Plaintiff,
984 Penobscot Building,
Detroit 26, Michigan.

MEMORANDUM REGARDING PROCEEDINGS AT HEARING

(Filed April 15, 1946)

At the hearing of this case on April 15, 1946, before His Honor, District Judge Arthur F. Lederle, in open court, the following proceedings were had:

Mr. Frank J. Ready, of counsel for the defendant, moved the Court for leave to enlarge the record (consisting of the pleadings, the stipulation of facts, and conflicting motions of the parties for summary judgment) by reading into the record the following extract from a certain official publication issued by the Commissioner of Internal Revenue, March 11, 1919, which was printed by the Government Printing Office, Washington, D. C., in 1919, in part, as follows:

Cover Page of Publication:

"MANUAL OF
REVENUE ACCOUNTING DIVISION
FOR USE IN
OFFICES OF COLLECTORS
OF INTERNAL REVENUE

(PRELIMINARY EDITION)
(Seal of Office of Commissioner of Internal Revenue)
WASHINGTON
GOVERNMENT PRINTING OFFICE
1919"

The Commissioner's letter appearing on the inside of the cover page thereof reading as follows:

"Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, March 11, 1919.

To all Collectors of Internal Revenue:

This preliminary issue of a manual on internal revenue accounting is furnished you at this time for the assistance and guidance of your employees in opening the revenue accounts of your office.

In the very near future it is planned to assemble and consolidate all previously issued bulletins and other regulations governing the keeping of your accounts, including instructions for sorting and listing returns, into a comprehensive illustrated manual which will fully explain the procedure to be followed in accounting for administrative appropriations as well as for revenues.

Sincerely yours,
DANIEL C. ROPER, *Commissioner.*"

Paragraphs 45, 51 and 52 thereof reading as follows:

Page 7:

"CORRECTIONS IN RETURNS.

"45. Wherever an error is discovered in a return the deputy in charge will prepare a correction voucher in the form of a letter to the taxpayer setting forth the nature of the error and stating the amount of tax originally shown, the amount of increase or decrease occasioned by the correction, and the amount which should have been shown. These letters must invariably show the name and address of the taxpayer, serial number of the return, and the kind of tax. One copy of the letter will be mailed to the taxpayer, one copy will be retained and attached to the return, one copy will be kept in the index files and one copy will be retained by the tax division. Such corrections will be recorded in the tax division daily journal of miscellaneous transactions, in the manner illustrated by Exhibits 12 and 13. The amount by which the total of each block of returns is increased or decreased will also be noted on the outside of the jacket, and the new balance (as corrected) will be brought down."

* * *

Page 8:

"ABATEMENT CLAIMS ALLOWED.

"51. An abatement claim allowed by order of the Commissioner is authority for making a reduction in the tax list and must be posted to the credit of the taxpayer's account. In the 'remarks' column of the list reference should be made to the abatement order number and date. For method of reporting such abatement orders see Exhibit 5.

"REFUND VOUCHERS.

"52. In case the taxpayer had paid the tax subsequent to the date of filing the abatement claim and prior to the receipt of the abatement order from the Commissioner the posting of the abatement order to his account as stated in the preceding paragraph will result in a credit balance. This constitutes an excess abatement and when proper authority has been secured from the Commissioner a refund will be made to the taxpayer. Similarly, refunds will be made for excess, erroneous or duplicate payments. Refund vouchers therefor will be prepared by the proper tax division and certified to the cashier for payment from the collector's disbursing funds for such purposes. The amounts of such refund vouchers will be posted to the tax list as a debit to the taxpayer. A daily report will be made of such refund vouchers in the manner illustrated by Exhibits 5, 6, and 12."

Counsel for the government explained to the Court that officers of the Bureau of Internal Revenue had called the above Commissioner's Manual of Revenue Accounting to his attention on the eve of his departure from Washington for this hearing and had requested that the above-quoted paragraphs thereof be introduced in evidence as part of the government's case; that it was then too late to make application for leave prior to the hearing today, but that this official printed matter had been shown this morning to counsel for the plaintiff; that counsel for the plaintiff had not objected to the form in which such evidence was now presented, but did object to its materiality or relevancy.

Counsel for the plaintiff objected thereupon to the above-quoted matter as mere instructions of the Commissioner of Internal Revenue to his subordinates and as irrelevant and immaterial herein, but the plaintiff did not object to the form in which such evidence was presented

by the defendant at this time. The Court overruled plaintiff's objection, allowing plaintiff an exception.

Thereupon, counsel for the government stated that no other provisions of the above-mentioned official printed government publication had any bearing upon this case and, without objection by counsel for the plaintiff, was permitted to withdraw the original document for return to the official files of the Bureau of Internal Revenue at Washington.

At the close of the argument, the cause was taken under advisement by the Court with leave to either party, if they hereafter should desire to call any later decisions on the question involved to the Court's attention, to submit a supplemental communication to the Court covering same, and furnish a copy to opposing counsel, provided they do this before the Court has rendered its decision.

The Court ordered that this memorandum of proceedings at the hearing be approved, filed and made part of the record in this cause, with exception reserved to the plaintiff as to the overruling of plaintiff's objection for irrelevancy or immateriality of the Commissioner's letter of instructions to Collectors hereinabove set forth.

Signed at Detroit, Michigan, this 15th day of April, 1946.

ARTHUR F. LEDERLE,
District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 14, 1946)

FINDINGS OF FACT

1. This action involves a claim by plaintiff, J. H. Noble, for the recovery of some $21,000.00 paid as income taxes by plaintiff to defendant, Giles Kavanagh, Collector of Internal Revenue for this District, upon a deficiency

assessment levied upon the 1935 joint income tax return of plaintiff and his wife, who were at that time residents of this District. The case was heard April 15, 1946, on oral argument of amended cross motions for summary judgment, supplemented by written briefs. The case is at issue on plaintiff's third amended complaint and defendant's answer thereto. The facts are not in dispute and were stipulated through a series of pre-trial hearings under *Rule 16, Fed. Rules of Civil Procedure.*

2. Briefly, the pertinent facts are as follows. The impugned assessment was predicated upon the disallowance by the Collector of the taxpayers' right to deduct capital asset losses of the wife from capital asset gains of the husband, as a result of which plaintiff paid defendant the sum of $21,105.90 on July 21, 1937. On December 9, 1940, in *Helvering* v. *Janney*, 311 U. S. 189, the Supreme Court held that husband and wife taxpayers filing a joint return were entitled to such a deduction. On January 28, 1941, plaintiff and his wife filed a claim for refund of this $21,105.90, citing the four year from payment provision of *26 U.S.C.A. 3313* as the applicable limitation period for filing such claim, alleging the assessment and collection to have been illegal. On August 19, 1941, the Commissioner formally notified plaintiff and his wife by registered mail of the disallowance and rejection of said claim for refund as not being timely under the two year from payment provision of *26 U.S.C.A. 322 (b) (1)*. On July 10, 1943, this action was instituted.

3. The sole controversy here is whether the taxpayer's claim for refund, filed within four years after payment, is timely under *26 U.S.C.A. 3313*, as an erroneous and illegal assessment and collection, or whether it is barred under the two year after payment limitation period prescribed by *26 U.S.C.A. 322 (b) (1)*. This point was decided adversely to the Government's contentions by the Sixth Circuit Court of Appeals in *U. S.* v. *Federer Terminal Warehouse*, 139 F. (2) 679, which case has never been reversed or overruled. Defendant's counsel concede that if this court follows that ruling, plaintiff is entitled

to judgment upon his motion for summary judgment. Defendant has filed an exhaustive brief, containing, among other things, the legislative history of sections 3313 and 322, in an attempt to show that the last cited case, as well as the ones upon which it relies, were decided incorrectly.

4. The amount here involved, with interest at six per cent per annum from July 21, 1937, is $32,266.29 as of this date.

CONCLUSIONS OF LAW

1. This is a suit for recovery of an alleged erroneously and illegally assessed income tax, and, as such, is an action arising under a law providing for internal revenue, over which this court has jurisdiction.

28 U.S.C.A. 41 (5).

2. A decision of the Circuit Court of Appeals for the Sixth Circuit, construing the limitation provisions covering filing of claims for refund of taxes, as contained in the Internal Revenue Code, is binding upon District Courts in the Sixth Circuit, including this court, until reversed or overruled.

Seattle-First Nat. Bk. v. *U. S.* 44 F. S. 603, affirmed in 136 F. (2) 676 and 321 U. S. 583.

3. The law established for this Circuit by the Sixth Circuit Court of Appeals is that money paid under the circumstances here involved constitutes internal revenue taxes illegally and erroneously collected, in which event the taxpayer has four years after payment to file claim for refund, under *26 U.S.C.A. 3313*, rather than two years, as provided by *26 U.S.C.A. 322 (b) (1)* in case of an overpayment.

U. S. v. *Lederer Terminal Warehouse*, CCA 6, 139 F. (2) 679;

See also:

Huntley v. *Southern Oregon Sales Inc.*, CCA 9, 102 F. (2) 538, and *Olsen* v. *U. S.*, D. C. Cal., 32 F. S. 276, cited as authority in the Lederer case;

Penna. Co. (Tindle Est.) v. *U. S.*, CCA 3, 152 F. (2) 757;

International Arms. etc. Co. v. *U. S.*, *Ct. Cl.*, 37 F. (2) 771;

Liberty Glass Co v. *Jones*, D. C. Okla., ... F. S. ....., decided April 3, 1946.

4. Accordingly, the claim for refund having been filed within four years after the payment of taxes illegally and erroneously assessed and collected, and this suit having been instituted within two years after notification by registered mail of the rejection of the claim for refund, both the claim for refund and this suit are timely.

26 U.S.C.A. 3313, as interpreted by *U. S.* v. *Lederer Terminal Warehouse*, supra;
26 U.S.C.A. 3772 (a) (1) and (2).

5. Where, as here, a case is at issue, there is no dispute as to any material fact, and the plaintiff is entitled to judgment as a matter of law, plaintiff's motion for summary judgment should be granted.

Rule 56 (a) and (c), Fed. Rules of Civil Procedure.

6. Accordingly, a summary judgment is being entered simultaneously herewith for the sum of $32,266.29 in favor of plaintiff and against defendant.

Dated: May 14, 1946.

ARTHUR F. LEDERLE,
District Judge.

SUMMARY JUDGMENT FOR PLAINTIFF

(Filed May 14, 1946)

In accordance with findings of fact and conclusions of law filed simultaneously herewith,

It Is Hereby Ordered that plaintiff's motion for summary judgment, as amended, be, and the same is hereby granted, and that the plaintiff, J. H. Noble, recover of the defendant, Giles Kavanagh, the sum of $32,266.29.

It Is Further Ordered that defendant's motion for summary judgment of dismissal, as amended, be, and the same is hereby overruled.

ARTHUR F. LEDERLE,
District Judge.

MOTION FOR AMENDED FINDINGS AND JUDGMENT UNDER RULE 52 OR, IN ALTERNATIVE, FOR A NEW TRIAL UNDER RULE 59

(Filed May 24, 1946)

Now Comes the defendant, by his attorneys, John C. Lehr, United States Attorney for the Eastern District of Michigan, and Morris Zwerdling, Assistant United States Attorney for said district, and respectfully moves this court that Paragraph 4 of the findings of fact and Paragraph 6 of the conclusions of law, filed by this Honorable Court on the 14th day of May, 1946, be amended to read as follows:

"FINDINGS OF FACT

"4. The amount here involved is $21,105.90, together with interest thereon to be computed from and after the date of payment thereof to the defendant on July 21, 1937, as provided by Section

177(b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1936 (28 U.S.C. 1940 Ed., Sec. 284).

"CONCLUSIONS OF LAW

"6. Accordingly, a summary judgment is being entered simultaneously herewith for the sum of $21,105.90, together with interest thereon to be computed from and after the date of payment thereof to the defendant on July 21, 1937, as provided by Section 177(b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1936 (28 U.S.C. 1940 Ed., Sec. 284)."

Defendant also moves that Paragraph 2 of the summary judgment for plaintiff entered on the 14th day of May, 1946, by this Honorable Court be amended to read as follows:

"It Is Hereby Ordered that plaintiff's motion for summary judgment, as amended, be and the same is hereby granted and that the plaintiff J. H. Noble recover of the defendant, Giles Kavanagh, the sum of $21,105.90, together with interest thereon to be computed from and after the date of payment thereof to the defendant on July 21, 1937, as provided by Section 177(b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1936 (28 U.S.C. 1940 Ed., Sec. 284)."

Said motion is made without prejudice to the right of the defendant to exercise his remedies by appeal from said judgment, if and when amended, and is made, for the following reasons:

The sum of $32,266.29, found to be due and owing by the court, ostensibly represents the sum of $21,105.90, together with interest from the date of payment to the Collector of Internal Revenue to the date of judgment at six per cent.

Judgment in this form would normally draw interest at the legal rate on the entire amount, or involve a liability for payment of interest on interest, contrary to the provisions of Section 177(b) of the Judicial Code, as amended (28 U.S.C. 1940, Sec. 284).

JOHN C. LEHR,
United States Attorney,

By MORRIS ZWERDLING,
Assistant United States Attorney,
Attorneys for Defendant.

Dated: May 24, 1946.

ORDER AMENDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed June 3, 1946)

On reading and filing defendant's motion for amendment of findings of fact and conclusions of law under the provisios of Rule 52 of the Federal Rules of Civil Procedure, and on the consent of counsel for plaintiff;

It Is Hereby Ordered that Paragraph 4 of the findings of fact, and Paragraph 6 of the conclusions of law, entered in the above-entitled cause on May 14, 1946, shall be and the same are hereby amended to read as follows:

FINDINGS OF FACT

4. The amount here involved is $21,105.90, together with interest thereon to be computed from and after the date of payment thereof to the defendant on July 21, 1937, as provided by Section 177(b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1936 (28 U.S.C. 1940 Ed., Sec. 284).

CONCLUSIONS OF LAW

6. Accordingly, a summary judgment is being entered simultaneously herewith for the sum of $21,105.90, together with interest thereon to be computed from and after the date of payment thereof to the defendant on July 21, 1937, as provided by Section 177(b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1938 (28 U.S.C. 1940 Ed., Sec. 284).

ARTHUR F. LEDERLE,
District Judge.

AMENDED SUMMARY JUDGMENT FOR PLAINTIFF

(Filed June 3, 1946)

On reading and filing defendant's motion for amendment of judgment for plaintiff and on the consent of the plaintiff hereto, the judgment entered in the above-entitled cause on May 14, 1946, shall be and the same is hereby amended to read as follows:

In accordance with findings of fact and conclusions of law filed simultaneously herewith,

It Is Hereby Ordered that plaintiff's motion for summary judgment, as amended, be, and the same is hereby granted, and that the plaintiff, J. H. Noble, recover of the defendant, Giles Kavanagh, the sum of $21,105.90, together with interest thereon to be computed from and after the date of payment thereof to the defendant on July 21, 1937, as provided by Section 177(b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1936 (28 U.S.C. 1940 Ed., Sec. 284).

It Is Further Ordered that defendant's motion for summary judgment of dismissal, as amended, be, and the same is hereby overruled.

ARTHUR F. LEDERLE,
District Judge.

NOTICE OF APPEAL

(Filed August 5, 1946)

Notice is hereby given that Giles Kavanagh, defendant above named, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the judgment entered in this action on May 14, 1946, as modified under the amended judgment entered on June 3, 1946, against the defendant in the sum of $21,105.90, plus interest computed thereon after July 21, 1937, according to law.

JOHN C. LEHR,
United States Attorney.

By: MORRIS ZWERDLING,
Assistant United States Attorney,
Attorneys for Defendant.

Dated: August 5, 1946.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(Filed August 13, 1946)

Giles Kavanagh, defendant and appellant herein, hereby designates the following portions of the record, proceedings and evidence to be contained in the record on appeal as follows:

1. Third amended complaint.
2. Answer to third amended complaint.
3. Plaintiff's motion for summary judgment.
4. Defendant's motion for summary judgment.
5. Agreed statement of facts.

6. Memorandum of court regarding procedure at hearing.
7. Findings of fact and conclusions of law.
8. Summary judgment for plaintiff.
9. Defendant's motion for amendment of findings and judgment.
10. Order amending findings of fact and conclusions of law.
11. Amended summary judgment.
12. Notice of appeal.
13. Stipulation re comparison of record.
14. This Designation.
15. Statement of Points on which appellant intends to rely.

JOHN C. LEHR,
United States Attorney,

BY MORRIS ZWERDLING,
Assistant United States Attorney,
Attorneys for Defendant

Dated: August 12, 1946.

STIPULATION RE COMPARISON OF RECORD

(Filed Aug. 22, 1946)

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto that the Record on Appeal as printed be certified and transmitted by the Clerk of the United States District Court for the Eastern District of Michigan to the United States Circuit Court of Appeals for the Sixth Circuit without comparison.

EUGENE M. BAYNES & W. H. HARRIS,

By W. H. HARRIS,
JULIUS L. BERNS,
JULIUS L. BERNS,
Attorneys for Plaintiff,

JOHN C. LEHR,
United States Attorney,

By MORRIS ZWERDLING,
United States Attorney,
Attorneys for Defendant.

Dated: August 19, 1946.

CERTIFICATE OF THE CLERK

EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

I, George M. Read, clerk of the United States District Court for said District, do hereby certify that the within and foregoing numbered pages contain a full and complete copy of all papers filed and all proceedings in said cause, in accordance with the appellant's designation of contents of record on appeal and in accordance with the stipulation entered into between attorneys for respective parties in said cause, waiving comparison by the clerk of the record on appeal.

In Testimony Whereof, I have hereunto signed by name and affixed the seal of said Court at Detroit, this ..... day of ....., A.D. 1946.

GEORGE M. READ,
Clerk, United States District Court,
Eastern District of Michigan.

By .....
Deputy Clerk.

TRANSCRIPT OF PROCEEDINGS FOR CERTIORARI APPLICATION

Cause argued and submitted

February 10, 1947

Before SIMONS, MARTIN, and MILLER, Circuit Judges

This cause is argued by S. Walter Shine for Appellant and by Julius L. Berns for Appellee and is submitted to the court.

Judgment

Filed February 11, 1947

This appeal has been considered on the record and on the oral arguments and printed briefs of attorneys for the appellant and for the appellee, respectively; and it appearing that reversal of the judgment below would necessitate overruling the previous decision of this court in *United States* v. *The Lederer Terminal Warehouse Company*, 139 F. (2d) 679 (C. C. A. 6), and no valid reason being presented for overruling that decision, the judgment of the district court is affirmed.

United States Circuit Court of Appeals for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Giles Kavanagh, Collector of Internal Revenue*, vs. *J. H. Noble*, No. 10,331, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 1st day of April A. D. 1947.

[SEAL]

(S) J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1947

738420—47

Supreme Court of the United States

Order allowing certiorari

Filed June 2, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.